u.k. environmental law association e-journal

e - law

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Contents

Chairman's Report

The agenda for the UKELA Council Meeting on 18th July was extensive covering, amongst other things, the Prize Moot, publication of the Year Book, resurrection of the Andrew Lees prize (which received unanimous support), the Garner Lecture (set for January with Jonathon Porritt as the keynote speaker), progress on Conference 2002 and the current status of UKELA Regional Groups.

There are currently eight Regional Groups that is: in Scotland, North West England, North East England, West Midlands, East Midlands, East Anglia, South West England and South East England. It would seem that Groups in North East England, East Anglia and South East England are having problems in generating regional interest for various reasons, notably geographic considerations (it may be that these Regions are too large to be viable) and work-overload - a constant problem for UKELA which relies predominantly on voluntary effort. The good news is that there is a high chance of setting up a Group in Wales - thanks to the efforts of the redoubtable Conference 2001 organiser Julian Boswall.

Council also gave considerable attention to resolutions proposed by Stephen Tromans and Richard Hawkins at Conference 2001 on UKELA having a voice on Environmental and Social Corporate Responsibility and the handling of the Foot and Mouth Outbreak respectively. Both found support from Council and indeed reflected Council's current intentions concerning the fulfilment of its primary charitable object "To promote for the benefit of the public generally the enhancement and conservation of the environment in the United Kingdom and in particular to advance the education of the public in all matters relating to the development, teaching, application and practice of law relating to the environment". Council felt that much was already being done in UKELA on the first resolution and although very supportive of the second resolution considered that it needed more time over the Summer period to decide how it should take this emotive and complicated issue forward.

UKELA MEETING : Environmental Reporting

You are invited to this UKELA Meeting to be held at the offices of CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD on Tuesday, 9th October 2001 at 5.00 pm for 5.30 pm.

This seminar will examine the current status of environmental reporting. Earlier this year the Prime Minister challenged all FTSE 350 companies to provide environment reports by the end of 2001 and DEFRA has prepared draft guidelines on the subject. Furthermore the DTI has recently produced the Company Law Review which incorporates reference to corporate governance and reporting.

At the EU level, Recommendation 2001/453/EC clarifies existing accounting rules and sets out guidance to improve the quality, transparency and comparability of environmental data included in annual accounts and reports with a view, amongst other things, to improving corporate environmental awareness.

These issues and others will be discussed at the seminar.

Speakers

Belinda Howell, Director, Business in the Environment, 137 Shepherdess Walk, London, N1 7RQ

Aaron Berry, Environment Business & Consumers Division, DEFRA, Ashdown House, 123 Victoria Street, London, SW1 6DE

Chairman:

Pamela Castle, Chairman, UKELA

Conditions:

a) Price UKELA Members £10.00
Non-Members £20.00
b) Cheques payable to UKELA.
c) CPD points and Bar Practice points available.
d) No acknowledgement of receipt will be made.
e) Seating capacity is 70. Places issued on "first come, first served" basis.

London Meetings- Future Dates

27th November 2001: Managing Radioactive Waste - law and policy

12th February 2002: Definition of Waste - an update

26th March 2002: Regulating new chemicals

23rd April 2002: Agricultural industry environmental issues

Moving on

If you have changed jobs, been promoted or had another career change or appointment that you would like UKELA members to know about, please let us know so that details may be included in what we hope will be a regular feature in future issues of e-law.

Details should be sent to: Valerie Fogleman at vfogleman@blg.co.uk

REPORT ON WORKING PARTIES

by MARK BRUMWELL
Working Party Co-ordinator

AUGUST 2001

1 **Contaminated Land Working Party – Convenor, Matthew Townsend**

The last meeting of this Working Party took place in March. The next meeting on 2 August was due to consider a follow up to the Law Society's warning card on contaminated land.

2 **Climate Change (Emissions Trading & Flexible Mechanisms) Working Party – Convenor, Helen Loose, Secretary, Anthony Hobley**

The Working Party met on 15 May to formulate a response to the DETR's recently published

framework document on the UK emissions trading system.

3 **Insurance and Liability Working Party – Convenor, Valerie Fogleman**

Meetings were held on 16 May 2001 and 5 July 2001. The main topic at the May meeting was the European Commission's White Paper on environmental liability. Comments on the White Paper were sent to DEFRA in early June. Topics discussed at the July meeting were as follows: continuing comments to DEFRA on the White Paper; a proposed UKELA debate on White Paper issues; and articles to aid non-environmental lawyers in understanding the issues in the Law Society's warning card on contaminated land liabilities. The Insurance and Liability Working Party is working with the Contaminated Land Working Party on the last topic.

4 **IPPC Working Party – Convenor, Jacqui O'Keefe**

No meetings of the Working Party have taken place recently.

5 **Nature Conservation Working Party – Convenor, Robert Simpson**

A meeting took place at the UKELA Conference. Matters to be discussed included: PPG9; Protected Species – infringement proceedings; Regional Planning Guidance; Diseases in Animals; CROW; the Royal Society's paper "*The Future of SSSIs"*; the Nature of Scotland – Consultation paper; DFRS – Consultation on Uncultivated Land etc and also a report on the UKELA meeting on GMO's.
A consultation paper on implementing the EIA Directive to uncultivated land or semi-natural areas was sent to the Working Party in May. A paper by Stephen Tromans on GMO's was also circulated to group members.

6 **Planning Law Working Party – Convenor, Mark Challis**

A meeting was held at the UKELA Conference to plan future meetings of the Working Party.

7 **Practice and Procedure Working Party – Convenor, Daniel Lawrence**

A consultation submission was made in early June in response to the Lord Chancellor's Department Consultation Paper entitled "*Judicial Review : A Proposed Pre-action Protocol*". This paper was sent to the Group by the Co-ordinator in April.

8 **Waste Working Party – Convenor, Andrew Bryce; Secretary, Anju Sanehi**

A meeting took place on 17 May. The majority of the meeting was devoted to discussing the consultation paper on the Special Waste Regulations and the consultation paper on Tradable Permits. A consultation response on the Special Waste Regulations was subsequently submitted.

9 **Water Working Party – Convenor, Mark Brumwell**

A meeting was held on 20 July, where David Shapiro of S J Berwin, gave a seminar on environmental mediation. A speaker from OFWAT is being organised for a subsequent meeting to review the interface between environmental and competition issues.
The group is also in the process of preparing a submission to DEFRA on issues within the Groundwater Directive. A submission was made on the first consultation paper on implementation of the Water Framework Directive.

PRE-ANNOUNCEMENT – EARLY REGISTRATION RECOMMENDED

ROYAL SOCIETY OF CHEMISTRY OCCUPATIONAL AND ENVIRONMENTAL TOXICOLOGY GROUP

Contaminated Land Risk Assessment

Tuesday October 9 2001

Scientific Societies Lecture Theatre
New Burlington Place
Off Savile Row
London W1X 1AB

PROGRAMME

9.30 – 10.00	Arrival and coffee
10.00 – 10.15	Chairman's Introduction – Michael Quint, PB Environment
10.15 – 10.45	Legal Background – Steven Francis, DLA
10.45 – 11.15	Environment Agency policy and guidance – Phil Crowcroft, Environment Agency
11.15 – 11.30	Morning Coffee
11.30 – 12.00	Human health risk assessment – Dr John Andrews, PB Environment
12.00 – 12.30	Toxicological considerations in human health risk assessment – George Kowalczyk, Department of Health
12.30 – 12.45	Discussion
12.45 – 1.45	Lunch
1.45 – 2.15	Ecological risk assessment – Terry Walden, BP
2.15 – 2.45	Controlled waters risk assessment – Tony Marsland, Environment Agency
2.45 – 3.00	Afternoon Tea
3.00 – 3.30	Property risk assessment – Steve Garvin, BRE
3.30 – 4.00	Financial risk assessment - Jim Finnamore, WSP
4.00 – 4.15	Discussion
4.15	Close

Seminar Fees ___ £95 (RSC members)
___ £125 (non-members)

Cheques should be made payable to : "RSC Toxicology Subject Group Trust"

Please send your details plus remittance to:

Michael Quint
Parsons Brinckerhoff
4 Roger Street
London WC1N 2JX

quintm@pbworld.com

Regulatory And Liability Issues On The Deliberate Release Of GMO's

by Daniel Lawrence, James Kennedy and Elizabeth Hattan

REGULATORY ISSUES

On 17 April 2001, Directive 2001/18/EC on the deliberate release of genetically modified organisms (GMOs) into the environment came into force. It must be implemented in each EU member state by 17 October 2002, and will replace the existing Deliberate Release Directive (90/220/EEC) which was incorporated into UK legislation by part VI of the Environment Protection Act 1990. All products that have been genetically modified are, in principle, subject to the authorisation procedures of the Directive, except for products that fall under other European legislation that provides for specific authorisation.

The new Directive, whose main aim is to harmonise bio-safety measures across the EU and to clarify and tighten the regime, has introduced a number of new amendments, including:

1) **New Procedures**: The EU approval procedures for releasing GMOs into the environment under the existing Directive have been criticised for their complexity and length, particularly for products considered safe by the exporting country which must still undergo the full authorisation procedures at EU level. The new Directive aims to overcome these criticisms by providing for:

- greater transparency generally in the approval process;
- the use of revised committee procedures for arriving at speedier decisions on particular applications to release GMOs; and
- "differentiated procedures". These provide shorter timetables for approving GMO release if there is sufficient experience of releasing the relevant GMOs into the relevant ecosystems, provided certain criteria are met, such as there being no additional risk to human health or the environment.

2) **Precautionary Principle:** The precautionary principle is central to the new Directive (the principle being that if the exact effect, or even whether there is any effect, of a potentially harmful release of a GMO to the environment is not known, a presumption exists against its release). According to

recital 8, it was taken into account in drafting the Directive and "must be taken into account when implementing it." For example, the application of the precautionary principle is seen in the general prohibition on releases without approval. Also, recital 5 of the new Directive states that the "protection of human health and the environment requires that due attention be given to controlling risks from the deliberate release into the environment of GMOs".

3) **New Time Limits:** - The precautionary principle is also seen in the system of time-limited consents that are introduced under the new Directive, under which first-time consents for releases of GMOs and renewals of authorisations, will be limited to 10 years (Articles 15(4) and 17(6)).

4) **Mandatory Monitoring**: New monitoring requirements are introduced by the new directive (Article 20), in order to "trace and identify any direct or indirect, immediate delayed or unforeseen effects on human health or the environment of GMOs" (Preamble, paragraph 43) A monitoring plan must be submitted as part of the original application (Article 13(2)(e)) and these monitoring measures must be implemented after the GMOs are "placed on the market" – that is, after they are made available to third parties, whether for payment or free of charge. The monitoring requirements also cover imports (recital 11). Products containing GMOs covered by the Directive cannot be imported into the EU if they do not comply with the Directive. A report on monitoring must also be provided as part of the consent renewal procedure.

5) **Environmental Risk Assessment**: The new Directive also requires an environmental risk assessment to be submitted to the competent authority by the person wishing to release the GMOs, as part of every application for a GMO release, whether for experimental and development purposes (Article 5) or for placing on the market (Article13(2)). One of the problems inherent in the existing Directive is the lack of any coherent and objective criteria for performing an environmental risk assessment. The new Directive addresses this by setting out in Annex II the objective of an environmental risk assessment, and the elements to be considered and general principles and methodology to be followed in performing it. An assessment must address not only the possible direct and immediate effects of releasing the GMO, but also indirect and delayed effects on human health or the environment. Moreover, as part of the risk assessment process, the cumulative long-term effects must also be analysed.

6) **New labelling and traceability requirements**: An important change made by the new Directive is the requirement, as part of the traceability rules, that GMO products be labelled with a statement that "This product contains genetically modified organisms". However, Article 21 of the new Directive provides that a threshold may be established below which products will not have to be labelled if they contain traces of authorised GMOs that cannot be excluded from the products. In addition, Article 4(6) provides that GMOs must be traceable "at all stages of the placing on the market" – it does not however provide any details as to how this is to be done or indeed what traceability actually means. To address this, a proposed regulation has recently been issued by the European Commission to amend the new directive and to clarify the rules and establish a framework for the traceability and labelling of GMOs (COM (2001) 182 final).

7) **Antibiotic Resistant Markers**: The new Directive introduces timetables for the gradual phasing out of antibiotic resistant marker genes (which are used for research purposes to track the success of the relevant gene transfer) from GMOs, with the end of 2004 targeted for commercial releases and the end of 2008 for experimental/research releases (Article 4).

8) **Public Consultation**: The new Directive requires Member States to consult the public and, where appropriate, interested groups on all proposed releases of GMOs, whether for experimental or commercial purposes. Details of GMOs released for experimental trials, including the locations of the trials, must be made available to the public. In addition, the locations of GMOs that are released for placing on the market will also have to be notified to the competent authorities and made known to the public in a manner the authorities deem appropriate.

9) **Safeguard clause tightened**: Under the existing directive, Member States can only restrict or prohibit the placing on the market of GMOs if they have a "justifiable reason" to do so. The new directive allows much less discretion by only allowing such measures if "new or additional information made available since the date of the consent and affecting the environmental risk assessment or reassessment of existing information on the basis of new or additional scientific knowledge" is found to exist showing that the GMO constitutes a risk to human health or the environment (Article 23)

The EU Commission's White Paper on Environmental Liability (February 2000) and its follow up Working Paper on Significant

Environmental Damage (July 2001) state that the release of GMOs as an activity should be covered by a future EU-wide civil liability regime. Recital (16) of the new Directive makes it clear that the Commission aims to bring forward a legislative proposal on environmental liability before the end of 2001, which will also cover damage from GMOs.

Further domestic regulations will be needed to implement the new Directive in the UK. The UK government is beginning to address how the new Directive will be implemented - which will no doubt stimulate debate in this highly controversial area. This is therefore an opportune time to review the main potential sources of civil liability in the UK for deliberate release of GMOs into the environment.

LIABILITY ISSUES

Liability in contract – Sale of Goods Act 1979

In addition to liability under any contracts between parties, liability may also arise from terms implied into relevant contracts by the Sale of Goods Act. "Goods" include food products and crops. Implied into every sale of goods is a term that the goods are of a quality, which a reasonable person would regard as satisfactory. The quality of goods includes their state and condition and fitness for purpose (including by reference to the product labelling), freedom from minor defects, and safety. The presence of GMO elements (even trace elements) in foods, particularly without appropriate labelling, may breach this implied term. If the goods are deemed objectively unfit, the buyer will be able to claim compensation. This liability extends up the supply chain: consumer may claim compensation from retailer, retailer from wholesaler, wholesaler from manufacturer and so on. In principle, pure economic loss flowing from each breach may also be recovered.

Liability under the Consumer Protection Act 1987 (CPA)

The CPA compensates a consumer for damage caused by a "defect" in a product. If the consumer can prove that he has suffered damage due to the defect, strict liability applies to the producer, supplier or importer of the product – regardless of fault.

The CPA applies to agricultural products so long as they have been subject to an "industrial process". It is arguable that genetic modification of a product (or parts thereof) is an industrial process and that the CPA will apply. Other issues may include how the requirement for a "defect" in a product will be applied in GMO cases (analogies have been drawn to computer software cases brought under the CPA) and whether the "development risk" defence under the CPA is applicable (ie that based on scientific knowledge at the time, the producer could not have discovered the defect). These issues are likely to be the main focus of initial cases brought under the CPA.

Liability under the CPA is usually limited to either personal injury or damage to consumer property, although in principle pure economic loss may also be recovered. It is important to note that there is no liability under the CPA for damage to commercial property such as farmland.

Liability in Negligence

To succeed in a claim of negligence, a claimant would have to demonstrate that:

- the party releasing the GMO had a duty of care to ensure the claimant (or a relevant class of claimant) did not suffer harm as a result of that release;
- there was a breach of that duty; and
- the breach resulted in harm to the claimant which was "reasonably foreseeable".

These general principles of negligence would apply whether the claim was brought, for example, by a GM farmer against a seed supplier, an organic farmer against a GM farmer, a conventional farmer against a seed manufacturer or any other combination of potential claimants and defendants.

It is likely that claimants bringing negligence actions in GMO cases will encounter difficulties, especially on causation issues. Considerable scientific (or possibly statistical) evidence on matters such as cross-pollination will be needed to establish the cause. However, scientific understanding of many of these issues is currently limited. Another issue is likely to be the context in which GMO contamination constitutes damage. This will involve an application of existing UK court decisions (notably *Cambridge Water* and *Blue Circle*).

In a successful negligence action on the release of GMOs, it is likely that the claimant can recover damages for personal injury, harm to property and

the resultant financial loss (including clean-up costs). However, pure economic loss in most cases is unlikely to be recoverable.

Liability in Private Nuisance

Private nuisance is a wrongful act that damages or interferes with another's use and enjoyment of their land. It usually involves a continuing pattern of behaviour, but has been held to cover a sustained release from one property spreading to another (such as the cross-pollination of crops).

To pursue a successful claim in nuisance, a claimant would need to be the owner or occupier of the affected land, and would have to demonstrate that any damage caused was foreseeable.

The benefits of claiming nuisance are that injunctions are more readily available and pure economic loss is recoverable. Although personal injury cannot be compensated, physical damage to property, damage to goods on land and consequential loss are all potentially recoverable.

The existence of a statutory authority for release may, however, be a defence to a nuisance action. While planning permission, for example, will not be sufficient for this purpose, given the comprehensiveness of the regulatory regime for GMO releases, such a defence might be applicable.

Liability under the rule in *Rylands v Fletcher*

This type of nuisance imposes strict tortious liability for "escapes" of hazardous materials arising from the occupation or use of land. The advantage to a claimant bringing a claim under *Rylands v Fletcher* as opposed to nuisance, therefore, is that it is no defence to show that all reasonable steps are taken to prevent the release.

The rule in *Rylands v Fletcher* only applies to "non-natural" uses of land. It remains to be seen whether, for example, the courts will regard growing GM crops as a "non-natural" use of land. As for nuisance, the claimant must be the owner or occupier of the affected land. Pure economic loss is recoverable but on most views personal injury is not.

The courts have tried to limit the rule in *Rylands v Fletcher* in recent years. However, some commentators have seen it as the area most suited for adapting to GM liability issues and it certainly remains an area to watch in this regard.

Breach of statutory duty giving rise to a civil remedy

This is a potential indirect source of liability: while breaches of the Environmental Protection Act 1990, for example, could result in criminal sanctions, a civil action could also be brought on the strength of such a breach. The viability of such a claim will depend essentially on whether parliament intended a civil right of action to arise from a breach of the relevant statute. Although this is doubtful in most cases (and it is unlikely to be practical where more suitable options exist) such a claim cannot be ruled out.

Cranfield University Policy & Legislation Unit (CUPLU)

1st CUPLU Seminar

The Precautionary Principle And the Law on Risk

Tuesday 6th November 2001
Cranfield University Library Theatre
9.30 – 17.30

Background

The Precautionary Principle, whilst widely accepted as a policy principle, has had a debatable impact on daily practice. Whilst it is subject to a variety of interpretations and different formulations there now seems to be a drive to decide, not if, but how, to move forward with greater application of this principle, in particular its incorporation into legislation.

However, regulators and the courts are uncertain on how to deal with risk and uncertainty; public and political perception of risk is often misguided; scientific knowledge and understanding is often inadequate; the EC and WTO have different views on how the Precautionary Principle should be applied; and businesses want less constraint and more profit.

However, what is certain, is that greater operationalisation of the precautionary principle, especially by regulators and in the courts, will have a big impact on industry and consumers. The time is

ripe for a balanced, carefully considered, debate before we drift or dive into inappropriate policy and practice.

This seminar will address the potential for, the means to, and the impact of, stronger application of the Precautionary Principle in areas such as biotechnology, manufacturing processes, ecological conservation, management, research and development, environmental pollution, food safety, product liability, transportation, energy and natural resources.

In order to stimulate debate, there will be a number of keynote presentations providing perspectives from some of the key players.

Proposed Speakers

- **CUPLU overview paper on the Precautionary Principle John Salter** - Visiting Professor of Law, Cranfield University & **Peter Howsam** - Reader in Water Policy, Law & Technology, IWE, Cranfield University
- **An EU perspective Gudrun Gallhoff** - European Commission, Directorate General, Health and Consumer Protection
- **A perspective from the UK judiciary** - to be confirmed
- **A UK Government (operational) perspective Ian Packard** - Head of Division, Sustainable Development Unit, DEFRA
- **A social-legal perspective Robert Lee** - Professor, Cardiff University Law School
- **A UK industry / business perspective Geraint Day** - Business Research Executive, Institute of Directors
- **An international trade law perspective Julian Morris** - author of "Rethinking Risk and the Precautionary Principle"

There is the possibility of one or two speakers from major industrial/business sectors

CANCELLATION POLICY

Notification of cancellation or substitution must be made in writing.
Substitutions can be made at any time.
No refunds will be given for cancellation within 7 working days of seminar.
Other cancellations will be subject to a 10% administration charge.

Seminar fee

£165 + VAT (includes refreshments, lunch and seminar pack)

Please contact:

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The editorial team (Catherine Davey and Hannah Mackinlay) want letters, news and views from you for the next edition due to go out mid-November.

All contributions, be they letters, articles, book reviews, case reports etc should be dispatched to Catherine Davey as soon as possible by email at:

catherine.davey@stevens- bolton.co.uk

The sooner we have the material from you, the sooner we will be in a position to produce the next edition!

Letters to the editor will be published, space permitting

Environmental Law aims to update readers on UKELA news and to provide information on new developments. It is not intended to be a comprehensive updating service. It should not be construed as advising on any specific factual situation

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for more information about working parties and events, including copies of all recent submissions.